IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

AZZEDINE ARROUB Claimant **PENSKE LOGISTRICS LLC** Employer	**APPEAL 21A-UI-15523-CS-T** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 04/04/21** **Claimant: Appellant (1)**

Iowa Code §96.5(2)a-Discharge/Misconduct
Iowa Code §96.5(1)- Voluntary Quit
Iowa Code § 96.4(3) – Ability to and Availability for Work

STATEMENT OF THE CASE:

On July 10, 2021, the claimant/appellant filed an appeal from the July 8, 2021, (reference 01) unemployment insurance decision that disallowed benefits based on claimant being discharged for violation of a known company rule. The parties were properly notified about the hearing. A telephone hearing was scheduled for September 1, 2021. The hearing was postponed until September 28, 2021. Due to telephone problems on behalf of the IWD the hearing was postponed until October 13, 2021. Testimony was taken of Shane Puhlman on October 13, 2021. During the cross examination of Mr. Puhlman the administrative law judge had to continue the hearing due to a fire alarm at IWD. The hearing was continued until November 2, 2021. Claimant participated through attorney, Nicholas W. Platt. Employer participated through Senior Human Resource representative, Shane Puhlman. Weldon Freeze was called to testify on behalf of the employer. Exhibits 1, A, B, C, and D were admitted into the record. Administrative notice was taken of the claimant's unemployment insurance benefits records.

ISSUES:

Was the separation a layoff, discharge for misconduct, or voluntary quit without good cause?

Is the claimant able to and available for work?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Claimant began working for employer on November 19, 2018. Claimant last worked as a full-time Class B Driver. Claimant was separated from employment on April 9, 2021, when he was discharged.

On January 27, 2021, claimant was injured on the job. Claimant was put on a work restriction that restricted him from lifting and pulling weight over 60 lbs. (Exhibit B). Claimant is still under the same work restriction. (Exhibit D).

On or about April 2, 2021, the employer had a meeting with it employees to go over the employee's policy on the importance of communication and the importance of the drivers to communicate when the deliveries would be late. Claimant was present for the meeting and discussed with his supervisor, Weldon Freeze, that due to his work restriction it may take him longer to make the deliveries.

On April 5, 2021, Claimant was late with his deliveries. Claimant was driving down the road and received a text from the employer. The claimant did not immediately respond to Mr. Freeze's text because he was driving. The road claimant was driving was blocked off by law enforcement and claimant had to exit and take an alternate route due to the road closure. Claimant pulled off the road and called the employer to discuss his lateness.

When claimant returned from his deliveries Mr. Freeze gave him a written warning for not communicating regarding his late deliveries. Claimant disagreed with the written warning and refused to sign the warning. At 12:30 p.m. the claimant was suspended pending a termination review for failing to communicate regarding his late delivery. (Exhibit 1, pg. 2)

Claimant was upset that he was suspended and claimant accused Mr. Freeze of discriminating against him due to his religion and race. Mr. Freeze gave claimant Mr. Puhlman's information to report his claim of discrimination. Mr. Puhlman is with the employer's human resources and is the appropriate person to report discrimination allegations.

Claimant called Mr. Puhlman to discuss his suspension. Mr. Pulhman explained that he was suspended because he had a prior warning about not communicating regarding his late delivery. During the phone call claimant accused Mr. Puhlman of discriminating against him due to his religion and race. During the phone call claimant became upset and accused Mr. Puhlman of discriminating against him based on his religion and his race. Prior to this phone call Mr. Puhlman has not met or spoke with the claimant.

Mr. Puhlman, Mr. Freeze, and Caitlin Zeigler, were part of a panel that decided to terminate claimant for his behavior not for his late deliveries.

The employer has an associate behavior and work rule policy that states the following:

> "Penske expects associates to follow all company policies and procedures and display behaviors that support the company's values and expectations…the following behaviors are examples of unacceptable associate conduct and such behaviors may result in disciplinary actions up to and including termination from employment. Behavior that is rude, condescending, or otherwise not socially acceptable, behaviors that violate workplace conduct policy such as discrimination, harassment, profanity, distracts from or interferes with a collaborative work environment. Uncooperative behavior with management or otherwise engaging in misconduct that does not support the company's goals and objectives including but not limited to: work failure or perform work or comply with request and instruction given by immediate supervisor or other management."

This policy was contained in the local procedures manual. Claimant acknowledged receipt of this policy on October 6, 2018 and January 16, 2021. (Exhibit 1, pgs. 6 & 8).

The claimant had received a prior warning on September 2, 2020, for violating the associate behavior and work rule policy. Claimant received that warning after an incident with his supervisor, Weldon Freeze. Mr. Freeze had made changes to claimant's schedule and claimant

was not happy about the changes. Claimant exchanged text messages and during the text message exchange claimant accused Mr. Freeze of being Islamophobic. An investigation into the matter occurred and Mr. Freeze was found to have changed claimant's schedule based on the business' needs. Claimant was notified in this warning that he was on a final written warning for his behaviors. The written warning did not notify claimant that he could be terminated.

On April 9, 2021, claimant was notified that he was terminated for violating the associate behavior and work rule policy.

Claimant is still under a weight restriction. Claimant started a new part-time job as a security guard in October 2021.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment due to job-related misconduct.

Iowa Code section 96.5(2)a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

> Discharge for misconduct.
>
> (1) Definition.
>
> a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. *Huntoon v. Iowa Department of Job Service*, 275 N.W.2d 445, 448 (Iowa 1979).

Iowa Admin. Code r. 871-24.32(4) provides:

(4) Report required. The claimant's statement and employer's statement must give detailed facts as to the specific reason for the claimant's discharge. Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. In cases where a suspension or disciplinary layoff exists, the claimant is considered as discharged, and the issue of misconduct shall be resolved.

Iowa Admin. Code r.871-24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The decision in this case rests, at least in part, on the credibility of the witnesses. It is the duty of the administrative law judge as the trier of fact in this case, to determine the credibility of witnesses, weigh the evidence and decide the facts in issue. *Arndt v. City of LeClaire*, 728 N.W.2d 389, 394-395 (Iowa 2007). The administrative law judge may believe all, part or none of any witness's testimony. *State v. Holtz*, 548 N.W.2d 162, 163 (Iowa App. 1996). In assessing the credibility of witnesses, the administrative law judge should consider the evidence using his or her own observations, common sense and experience. *Id.* In determining the facts, and deciding what testimony to believe, the fact finder may consider the following factors: whether the testimony is reasonable and consistent with other believable evidence; whether a witness has made inconsistent statements; the witness's appearance, conduct, age, intelligence, memory and knowledge of the facts; and the witness's interest in the trial, their motive, candor, bias and prejudice. *Id*.

After assessing the credibility of the witnesses who testified during the hearing, reviewing the exhibits submitted by the parties, considering the applicable factors listed above, and using her own common sense and experience, the administrative law judge finds the employer's version of events to be more credible than the claimant's recollection of those events.

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented substantial and credible evidence that claimant knew about the employer's policy after having been warned. Despite these warnings, claimant continued to engage in similar behavior. The claimant's attorney argued that claimant was merely trying to report allegations of discrimination. However there is a difference between reporting discrimination and asking for an investigation, and accusing everyone of discrimination when a person does not like getting disciplined. Furthermore, the claimant denied that he accused

anyone of being a racist or being Islamophoic. Claimant's complete denial of saying these things about Mr. Freeze and Mr. Puhlman makes him not credible.

The employer has met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. Since an incident like this has occurred before and claimant was on a prior final warning for conducting himself in this manner, this is disqualifying misconduct. Benefits are denied.

Since claimant is denied benefits the issue of his ability to work and availability to work is moot.

DECISION:

The July 8, 2021, (reference 01) unemployment insurance decision is affirmed. The claimant was discharged from employment due to job-related misconduct. Benefits are withheld until such time as he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount, provided he is otherwise eligible.

The issue of claimant's ability to work and availability to work is moot.

Carly Smith
Administrative Law Judge
Unemployment Insurance Appeals Bureau

December 6, 2021
Decision Dated and Mailed

cs/mh

NOTE TO CLAIMANT:

- This decision determines you are not eligible for regular unemployment insurance benefits under state law. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision.